

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ANNA PLAVCAN, :
AS OFFICER OF LIMA FLORISTS, INC. :
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period September 1, 1982 :
through August 31, 1985. :

In the Matter of the Petition :
of :
STEPHAN PLAVCAN, :
AS OFFICER OF LIMA FLORISTS, INC. :
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period September 1, 1982 :
through August 31, 1985. :

DETERMINATION

In the Matter of the Petition :
of :
LIMA FLORISTS, INC. :
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period September 1, 1982 :
through August 31, 1985. :

Petitioners, Anna Plavcan, Stephan Plavcan and Lima Florists, Inc., 2019 Lake Avenue, Lima, New York 14485, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1982 through August 31, 1985 (File Nos. 803109, 803110, 803111).

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 259 Monroe Avenue, Rochester, New York, on December 3, 1987, at

2:45 P.M., with all briefs to be filed by December 30, 1987. Petitioners appeared by Kenneth D. Licht, Esq. and by John A. Raniewicz, C.P.A. The Audit Division appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUE

Whether the penalties and interest in excess of the statutory minimum, which were imposed against the corporation and two of its officers, should be waived.

FINDINGS OF FACT

1. On December 19, 1985 the Audit Division, on the basis of a field audit, issued two notices of determination and demands for payment of sales and use taxes due to petitioner Lima Florists, Inc. ("Lima Florists") which in the aggregate assessed a deficiency of sales and use taxes for the period September 1, 1982 through August 31, 1985 in the amount of \$30,084.53 plus penalty of \$5,726.43 and interest of \$6,037.40 for a total amount due of \$41,848.36. On the same day, the Audit Division issued notices assessing the same amount of tax, penalty and interest against Stephan Plavcan and Anna J. Plavcan as officers of Lima Florists.

2. In the course of the field audit, the Audit Division found that Lima Florists did not have any journal showing gross sales, taxable sales or exempt sales during the audit period. The Audit Division also found that while Lima Florists had sales invoices and exemption certificates, the exemption certificates could not be traced to the sales invoices. Furthermore, the sales invoices could not be traced to the sales tax returns.

3. The amount of sales and use taxes found due on audit was based on additional gross sales found on the corporation's Federal income tax returns compared to the sales reported on its sales tax returns for a portion of the audit period, and on a comparison of bank deposits with the gross sales reported on Lima Florists' sales and use tax returns for the remainder of the period. Gross sales reported were increased by the amount of these discrepancies to determine total audited gross sales. Since Lima Florists could not substantiate nontaxable sales, all sales were presumed taxable. The additional taxable sales were determined by subtracting the reported taxable sales from the audited gross sales for the audit period. The amount of additional taxable sales of \$429,779.00 resulted in the additional tax due of \$30,084.53.

4. On the basis of documentation submitted at a prehearing conference, the amount of tax asserted due was reduced to \$10,978.41 plus penalty and interest. After the conference, each petitioner agreed to the amount of tax. Consequently, only penalty and interest in excess of the statutory minimum remain in issue.

5. Lima Florists had eleven greenhouses and a flower shop. Depending upon the season, it had from 3 to 10 employees. Mr. Plavcan was the president of Lima Florists and was primarily responsible for the care of the firm's greenhouses. Mrs. Plavcan was primarily responsible for the flower shop.

6. Lima Florists' sales and use tax returns were prepared by an accountant. The total sales were determined from deposits shown on the bank statements plus checks received from customers which were not deposited in the business bank account.

SUMMARY OF PETITIONERS' POSITION

7. At the hearing, petitioners maintained that approximately two-thirds of Lima Florists' sales were made to exempt organizations and that the returns were accurately prepared to the best of their ability. Nevertheless, they agreed with the tax assessed by the Audit Division because they did not have the records to prove the amount of the exempt sales.

8. Petitioners acknowledged at the hearing that they did not obtain the sales tax exemption number in every instance because the sale was either made late in the day or the individual petitioners were very busy. As a result they were unable to obtain and assemble essential information for the preparation of their tax returns. However, they submit that since the time of this audit, which was petitioners' first, they have made a diligent effort to comply with the requirements of the Sales Tax Law.

CONCLUSIONS OF LAW

A. That Tax Law § 1145(a)(1)(i) authorizes the imposition of a penalty for failure to file a return or to pay or to pay over any tax under Article 28 in a timely manner. During the period in issue, Tax Law § 1145(a)(1)(ii) further provided as follows:

"If the tax commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it shall remit all of such penalty and that portion of such interest that exceeds the interest that would be payable if such interest were computed at the rate set by the tax commission pursuant to section eleven hundred forty-two. The tax commission shall promulgate rules and regulations as to what constitutes reasonable cause."

B. That during the period in issue 20 NYCRR former 536.1(b) provided:

"Reasonable cause. In determining whether reasonable cause exists for waiving interest or penalties, the taxpayer's previous compliance record may be taken into account. Reasonable cause must be affirmatively shown by the taxpayer in a written statement. Grounds for reasonable cause, where clearly established, may include the following:

(1) death or serious illness of the taxpayer, a responsible officer or employee of the taxpayer, or his unavoidable absence from his usual place of business;

(2) destruction of the taxpayer's place of business or business records by fire or other casualty;

(3) timely prepared returns misplaced by the taxpayer or a responsible employee of the taxpayer and discovered after the due date;

(4) inability to obtain and assemble essential information required for the preparation of a complete return despite reasonable efforts;

(5) pending petition to the Tax Commission or formal hearing proceedings involving a question or issue involving the computation of tax for the year, quarter, month or other period of delinquency; or

(6) any other cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay in filing a return and which clearly indicates an absence of gross negligence or willful intent to disobey the taxing statutes. Past performance will be taken into account. Ignorance of the law, however, will not be considered reasonable cause."

C. That the evidence presented does not establish that petitioners' failure to comply with the Tax Law was due to reasonable cause and not willful neglect. Rather, the record shows that petitioners simply concluded that they were not going to take the time to maintain adequate

records because of other concerns. Such reasoning does not constitute reasonable cause for noncompliance with the Tax Law. Moreover, contrary to petitioners' argument, the "inability to obtain and assemble essential information" as described in 20 NYCRR former 536.1(b)(4) does not contemplate a situation where the taxpayer intentionally causes said inability. Lastly, it is noted that the cases relied upon by petitioners, *Matter of 3rd Avenue Grinding Shop, Inc.* (State Tax Commn., July 15, 1983) and *Matter of Nu-Way Drug Center of Stony Brook, Inc.* (State Tax Commn., May 27, 1983), do not support the cancellation of the penalty. Neither case presented a situation where such a casual disregard of the Tax Law was so evident.

D. That the petitions of Lima Florists, Inc., Stephan Plavcan and Anna Plavcan are denied and the notices of determination and demands for payment of sales and use taxes due, modified as indicated in Finding of Fact "4", are sustained.

DATED: Albany, New York
March 10, 1988

ADMINISTRATIVE LAW JUDGE